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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Note verbale dated 12 August 1993 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General

The Permanent Representative of the Kingdom of Belgium to the United Nations presents his compliments to the Secretary-General and has the honour to refer to General Assembly decision 47/414, by which it was decided to include in the provisional agenda of its forty-eighth session the item entitled "Convention on jurisdictional immunities of States and their property" and which appears under agenda item 149.

The Permanent Representative of Belgium wishes to inform the Secretary-General that he has attached hereto the comments by Belgium concerning the draft articles on jurisdictional immunities of States and their property and would be grateful if the Secretary-General would have them circulated as an official document of the General Assembly, under item 149 of the provisional agenda.

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ANNEX

Comments of Belgium concerning the draft articles on jurisdictional immunities of States and their property

1. The draft articles on jurisdictional immunities of States and their property formulated by the International Law Commission constitute a good basis for consideration in order to draw up an international convention.

2. Belgium confirms its support for General Assembly decision 47/414 to re-establish at its forty-eighth session the Working Group of the Sixth Committee entrusted with the task of considering how best to orient the draft articles. In view of the complexity of the subject and the numerous international conventions which have still not entered into force owing to an insufficient number of ratifications, there is a need, nevertheless, to act prudently. For this reason, the Working Group should, taking into account current prevailing economic and trade conditions, endeavour above all to bring about a real international consensus on the issues of substance relating to the matter before an international conference of plenipotentiaries can be convened. Belgium nevertheless hopes that the Working Group, during the forty-eighth session of the General Assembly and through its concentrated work over two weeks, will succeed in achieving sufficient agreement in order to permit the holding of such a conference as early as 1994.

3. The task of achieving this objective is considerably facilitated by the fact that the Working Group will be able to continue its work on the basis of the progress made at the forty-seventh session of the General Assembly under the chairmanship of Ambassador Carlos Calero-Rodrigues, who deserves to be commended. Not only did the report drawn up under his guidance (A/C.6/47/L.10) make it possible to identify several key questions, but the Chairman of the Working Group also put forward compromise formulations which the Working Group would do well to consider carefully.

4. The Belgian Government wishes, at this stage, to make the following observations concerning the various draft articles under consideration:

Article 2, paragraph 1 (b): definition of a State

The definitions and, in any event, the definition concerning the concept of a federal State in subparagraph (b) (ii) of the draft text might be interpreted in different ways in view of the great diversity of cases which may arise. An element of ambiguity might then be introduced into the application of the Convention in this regard.

In the view of the Belgian Government, there are two drawbacks to the solution chosen by ILC in subparagraph 1 (b) (ii):

1. There is a certain inconsistency between, on the one hand, the statement made in subparagraph (b) (ii) that the term "State" means the constituent units of a federal State and, on the other hand, the commentary by ILC that it nevertheless depends upon the constitutional practice or historical

background of each federal State in deciding the question of the immunity to be granted.

2. Any jurisdiction of the State of the forum could be obliged to take a decision, on the basis of historical or constitutional research, on the basic organization of a foreign State, which, undoubtedly, will prove to be a difficult and very delicate task.

Accordingly, Belgium considers that a solution based on article 28 of the 1972 European Convention on State Immunity would be highly preferable. While recognizing the divergent practice of States as well as the uncertainty prevailing in that area, under this article federal States have the responsibility to determine, by means of a declaration submitted to the depositary, which of their federal constituent units are entitled to enjoy jurisdictional immunities. This solution would eliminate the ambiguity which otherwise would be created for applying the Convention.

On the basis of these views, the Belgian Government considers that the suggestion put forward by the Chairman of the Working Group in paragraph 9 of his report is acceptable.

Article 2, paragraph 2: the concept of a commercial transaction

A suitable definition of the concept of a "commercial transaction" is essential in order to complete the draft articles. Since the end of the nineteenth century, Belgian courts have followed the principle of limited immunity in distinguishing between acts that are jure imperii and those that are jure gestionis. In practice, this has not given rise to much controversy.

In Belgium's opinion, the commercial nature of a transaction should be determined by taking into account the sole legal nature of the transaction rather than by a reference to its purpose. Choosing the latter criterion would create a considerable element of uncertainty for a private party, who will not know in advance whether or not a transaction is covered by immunity. In this connection, it has been rightly pointed out that "there is room for the view that any activity of a State - even if ostensibly of a private law nature - is performed jure imperii as aiming at the welfare of the State." (Oppenheim's International Law, 9th edition, 1992, p. 362, note 31). It indeed seems that the criterion of the purpose is difficult to apply.

If, nevertheless, provision should be made for this criterion, the compromise wording proposed by the Chairman of the Working Group is worthy of consideration (document A/C.6/47/L 10, para. 15). Unless the foreign State has expressly stated, at the time when the transaction is being concluded, that it is performing an act for a public end, it is only fair to ensure that the private party is not deprived of the possibility of having recourse, if need be, to the court.

Belgium finds it somewhat difficult to share the view that this proposal is likely to have a negative impact on the readiness of the trading partners to enter into transactions with States, particularly developing States (document A/C.6/47/L.10, para. 17). In the first place, the dissuasive impact on the desire to enter into a contract with a foreign State would clearly be greater in

a situation where a jurisdiction might, at any time, consider that the purpose of the transaction (not necessarily known in advance) involves immunity from jurisdiction. Furthermore, the major changes, which, in recent years, have come about in the structure of economic systems, both at the national and international levels, as well as growing recourse to the principles of the market economy justify the belief that the parties will be able to negotiate more easily on an equal footing.

Article 11: Contracts of employment

While the principle of non-immunity in contracts of employment, set forth in the first paragraph of the draft, is acceptable, it would seem that the exceptions enumerated in paragraph 2 are much too broadly defined. The attempt to balance the interests of the employer State with those of the State of the forum in the application of labour law may be detrimental and too biased in favour of the employer State.

Although this question may be analysed in terms that invoke the abstract interest of the State of the forum in the establishment of labour regulations and the application of its labour law in its territory, this interest is none the less justified by the desire to grant a natural person who is a party to a contract of employment concrete guarantees of legal protection. In this context, Italy has rightly recalled "that every extension of the immunity of States from foreign jurisdiction implies an equal limitation of the individual right of access to courts: i.e., of a fundamental right which is proclaimed today not only by most national constitutions but also by various important international instruments" (A/47/326/Add.3, p. 3).

Paragraph 2 (a)

The formulation of the scope of this exception to the principle expressed in article 11 may give rise to confusion and should be further specified. It is not so much the idea contained in this paragraph that is open to criticism (even though it seems preferable to require that it be directly rather than closely related to the exercise of governmental authority), as its application that may be too open to interpretation. While it would seem logical that duly accredited diplomatic or consular agents would be covered under this exception to non-immunity, there is a priori no reason to exclude many other professional categories from the jurisdiction of the State of the forum (for example, private secretaries, interpreters or translators, mentioned in subparagraph 9 of the Commission's commentary on article 11 and, in general, most administrative and technical staff).

Paragraph 2 (b)

Belgium believes it must be clearly stated that this paragraph is without prejudice to the remedies that may be invoked in the State of the forum in order to obtain pecuniary compensation in the event of unfair dismissal (which must obviously include equivalent acts of breaking a contract of employment).

This question would best be addressed in a new general paragraph, drafted as a saving clause. However, the Chairman's proposal to add a phrase to paragraph 2 (b) (A/C.6/47/L.10, para. 29) would also be acceptable.

Paragraph 2 (c)

The criterion of nationality or of habitual residence appears to be of little relevance, or at least too categorical. The Commission explains that if there is no such link between the employee and the State of the forum, then the State of the forum "lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State (A/46/10, p. 100).

Contrary to this statement, however, it would seem that the territorial connection with the State of the forum in respect of the place of performance of services ought to prevail for purposes of denying immunity, since this connection might in itself open up certain remedies to the employee against the social security system of the State of the forum, while the current wording might deprive of every legal protection persons who are neither nationals nor habitual residents of the State of the forum at the relevant time (A/456/10, p. 101).

Article 12: personal injuries and damage to property

Belgium endorses the principle set forth in article 12. The right to effective compensation for personal injury or damage to tangible property in the circumstances contemplated in this article must be recognized. This article should thus have the effect of encouraging States to cover their liability by means of insurance and of preventing insurance companies from hiding behind the cloak of State immunity in order to evade their obligations towards victims.

Yet the fact remains that the wording of article 12 seems overly complex and could be simplified if it were modelled on the wording of article 11 of the European Convention on State Immunity of 1972.

Article 18: measures of constraint

In the Belgian Government's view, it would have been desirable to state as a general rule that immunity from execution comes after and is the corollary of immunity from jurisdiction even if, previously, the two issues might have been treated separately. There is little reason to grant States engaging in commercial transactions immunity from measures of execution other than in certain very specific cases, when such forms of immunity are denied to private individuals even though they may be in identical circumstances. From this perspective, the draft article appears to be unsatisfactory. If article 18 is read together with article 19, which enumerates the specific categories of property of a State that are exempt from any measure of constraint, one is led to believe that the conditions for execution are in fact so restrictive in practice that they would virtually preclude any possibility of instituting execution proceedings against a State without its consent.

Some progress, however, seems to have been realized in the discussions in the Sixth Committee working group. Belgium welcomes the compromise proposals put forward by the Chairman, which are steps in the right direction (A/C.6/47/L.10, paras. 21-25):

The deletion of the last phrase of paragraph (1) (c) of article 18 requiring a link between the property which is the object of the measures of constraint on the one hand and the underlying claim or agency or instrumentality concerned on the other;

The differentiation between pre-judgement measures of constraint and post-judgement measures of constraint;

The option of States to comply with a judgement before measures of constraint are taken against them. It should be clear, however, that this condition is appropriate only in so far as a judgement has been rendered on the merits and would not have much meaning in the context of provisional measures of constraint such as attachment and arrest;

Suggestions that provision be made in the text of the Convention for the obligation of States to satisfy a judgement and the possibility of execution of a judgement in the territory of a third State.

Article 22: privileges and immunities during court proceedings

Belgium cannot agree with paragraph 2 of this draft article, which exempts the foreign State from the obligation to provide any security to guarantee the payment of judicial costs, even when it is the plaintiff. This provision grants an unjustified privilege to States. For reasons of equity, a foreign State, when it does not benefit from immunity, and at the very least, when it is the plaintiff, must be treated on an equal footing with private persons for purposes of the application of the rules of procedure of the State of the forum.

Settlement of disputes

It is essential to include provisions concerning the settlement of disputes. For, assuming that the draft articles become an international Convention, this instrument will give rise to legal obligations under international law whose scope would best be determined as uniformly as possible in order to minimize the risks of friction between States.

During the forty-eighth session of the General Assembly, it will be particularly important to arrive at a consensus on the need for a legal mechanism for the settlement of disputes. The elaboration of the details of any such mechanism could then be left to the diplomatic Conference that the General Assembly would decide to convene.